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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. [redacted] 178

State Tax Commission of Utah, Petitioner,

vs,

Pacific States Cast Iron Pipe Co., a corporation,
Respondent.

Respondent's Brief In Opposition To Petition For A Writ of Certiorari

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INDEX

	Page
Jurisdiction	2
Question Presented	2
Scope and Grounds of the Decision Below	2
Statement of the Case	3

Argument:

1. The writ should not be granted because the decision of the Utah Supreme Court is in complete accord with prior decision of this Court. 8
2. The writ should not be granted because the question involved is of no substantial importance to anyone, except this respondent. 14
3. The writ should not be granted because the decision may rest on an adequate state ground. 15

CITATIONS

Cases:

Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938)	9
Banker Brothers v. Pennsylvania, 222 U.S. 210 (1911)	9
Brooks Transp. Co., Inc. v. United States, 93 Fed. Sup. 517 (1950) (E. D. Va.) Aff. 340 U.S. 925 (also affirming Lenoir Chair Co. Cont. Car. App., 51 MCC 65)	14
Dept. of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941)	10
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933)	9
Freeman v. Hewit, 329 U.S. 294 (1946)	9
Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932)	9
Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939)	9
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)	9
International Harvester Co. v. Dept. of Treasury, 322 U.S. 340 (1944)	10

	Page
McGoldrick v. Berwind-White Co., 304 U.S. 33 (1940)	9
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934)	9
Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946)	10
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923)	9
Superior Oil Co. v. Mississippi, 280 U.S. 390 (1930)	10
Williams Bros. Corp. Cont. Car. App., 44 Motor Carrier Cases (ICC) 557 (Div. 5) (1945)	14
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935)	9

Constitution:

Federal Constitution, Art. I, Sec. 8	2
Section I, Fourteenth Amendment	2

Statutes and Regulations:

28 U.S.C. Sec. 1257 (3)	2
Sec. 59-15-6, U.C.A. 1953	15
Sales Tax Regulation No. 44	2, 16

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State Tax Commission of Utah, Petitioner,

vs.

Pacific States Cast Iron Pipe Co., a corporation,
Respondent.

Respondent's Brief In Opposition To Petition For A Writ Of Certiorari

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This brief is respectfully submitted by respondent in opposition to the petition for a writ of certiorari filed by the State Tax Commission of Utah to review a judgment of the Supreme Court of Utah entered February 20, 1962, invalidating an assessment of sales tax on the gross receipts of certain interstate sales and shipments of cast iron pipe to

out-of-state sewage and water works job sites where, in lieu of shipment by common carrier, respondent employed and paid the buyer to haul the pipe to the out-of-state job site destination.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provision of 28 U.S.C. [illegible]c. 1257 (3), "in that the validity of a state statute is drawn into question on the grounds of its being repugnant to federal law."

QUESTION PRESENTED

Contrary to petitioner's statement, the question presented here is whether Utah, the state of the seller, can impose a sales tax on the proceeds of interstate sales (the bulk of which have already been subjected to sales or use tax by the state of the buyer) under the commerce clause of the Federal Constitution (Art. I, Sec. 8) and under the definition of interstate commerce contained in Utah Sales Tax Regulation No. 44 (set forth on pages 12-13 of the petition).

Also involved and raised below were the questions whether such a tax denies to respondent the equal protection of the laws and deprives respondent of property without due process of law, all in violation of Section I of the Fourteenth Amendment of the Federal Constitution.

Scope and Grounds of the Decision Below

The opinion of the Supreme Court of Utah appears to place its decision on the Federal ground that the tax is

in violation of the commerce clause of the Federal Constitution.

It may be suggested, however, that the decision may be in part grounded on the Utah State interstate commerce definitional Regulations, interpreted in the light of the decisions of this Court relating to interstate commerce. Or, put another way, it may be suggested that the Utah Court with "a conceded factual situation pointing to an interstate shipment" before it, refused to construe the Utah regulatory definitions to permit a tax which the decisions of this Court clearly, and would otherwise, invalidate.

Statement of the Case

In its argument below and again here in its petition for certiorari, the Tax Commission persists in its attempt to convert the special facts of this case into the ordinary case of a fully consummated local sale where the purchaser, resident or non-resident, then or thereafter, with or without the knowledge of the seller, merely *intends* to take the property to some other state. For this reason, it is necessary to make some revision of petitioner's statement of the case so that the facts will more nearly conform to those set forth in the opinion of the Supreme Court of Utah.

Respondent manufacturers cast iron pipe at its plant in Provo, Utah, which is sold throughout the western states. All pipe is sold on the basis of delivered prices, including freight, to the specific job site where the pipe is to be buried in the ground for use in sewage or waterworks systems. The pipe is sold mainly to governmental units or agencies in accordance with detailed engineering plans and specifica-

tions and on the basis of sealed bids generally submitted after public advertisement.

Respondent maintains various sales offices and agencies in the Western states. When a job is advertised or let for bid, the sales agents secure from the engineer in charge the name of all contractors bidding on the job and make up a detailed list of all pipe and related material set forth in the plans and specifications required in performance of the job.

All prices are figured and quoted to the contractors on the basis of prices of the material delivered to the specific job site, including freight at the regularly established common carrier rate, and in the specific amounts, sizes and lengths to conform to the job engineering plans and specifications.

Cast iron pipe is heavy and expensive. Freight is a significant portion of the delivered sales price. Practically all pipe is paid for by the customer out of the proceeds of the job on which the pipe is used. No sales are made until the sales agents secure a legal description of the specific real estate where the pipe is to be buried in the ground for lien foreclosure purposes or a description of the contractor's bond, if the job is a bonded one.

Respondent maintains strict control and has complete responsibility over all arrangements for the delivery of pipe to the job site. No pipe is sold at prices f.o.b. plant, plus freight, but all pipe is quoted and sold at prices delivered to a specific job site, including freight. Through its sales agents, irrespective of the method of delivery employed by respondent, and in the case of every sale respondent liter-

ally follows the pipe right into the ground to insure collectibility of each account out of the proceeds of each job. All sales are individually quoted and priced on a delivered basis to contractors at the specific job site and point of use where the pipe will be buried in the ground. Respondent, legally and in fact, is obligated to effect delivery of the pipe to the job site.

Respondent normally effects delivery of pipe to the job site (a) by common carrier, truck or rail, (b) in some cases, by its own trucks where the job site is in a remote or isolated area, or (c) as in the cases here involved, by employing and paying the customer-contractor to haul the pipe to the specific job site. In no case is a customer permitted by respondent to haul the pipe to the job site unless respondent is completely satisfied the contractor has adequate handling and transport facilities to effect the haul and adequate insurance in force covering any damage to the pipe in transit.

The bulk of respondent's sales are shipped by common carrier with freight prepaid. In the cases here involved, the customer was paid the regularly established tariff rate to the out-of-state job site not in cash but by credits against the delivered invoiced prices.

Irrespective of the method of delivery employed by respondent, the contractual documents with the customer are exactly the same, including quotation forms, invoice forms and bill of lading forms.

The engineering plans and specifications covering each job generally show its precise location, the specific sizes and lengths of pipe and related material needed for the job, how

and where the pipe is to be laid in the ground, etc. Respondent's quotations to all bidders show on their face the name and out-of-state location of the job and prices delivered to the specific job site for the specific list of pipe materials set forth in the plans and specifications. The prices quoted are shown as delivered prices to the job site, f.o.b. foundry, and with full truckload freight allowed to destination. The invoices show the name and address of the customer, the name and out-of-state location of the project and the out-of-state final destination of the material. The customer's truck driver, exactly as in the case of common carrier shipments, signs a standard form of bill of lading showing respondent's name as consignor, the customer's name as consignee and the job site location by town and state under "Destination."

The contractual documents clearly obligate respondent to effect a delivery of material to a specific out-of-state job site for a delivered price regardless of the method of delivery employed, whether by common carrier, its own trucks, or by customer truck. Provisions passing title f.o.b. foundry were inserted for the purpose of helping insure careful handling and unloading by the customer alongside trenchsite at destination and as some protection against breakage or damage in transit. In practically all cases, however, of damage to material in transit, claims against the carrier or insurance company are processed by respondent's traffic department and not by the customer.

All of the interstate sales here involved were in fact shipped across the state line to the out-of-state job sites according to contract and none were diverted to local intrastate use. Further, the bulk of the sales involved have al-

ready been subjected to sales or use tax by and in the states of destination.*

Although the sales and contractual arrangements were exactly the same in all cases, petitioner here singled out for tax those interstate sales delivered by customer truck and left untouched those delivered by common carrier, truck or rail, or by respondent's own trucks.

The sales contracts here involved were negotiated and effected (subject to home office approval) by respondent's sales agents at their out-of-state sales offices, having sales jurisdiction over the particular territories to which the out-of-state shipments were made.

The testimony showed that respondent, a relatively small producer of pipe in the industry, and with a relatively limited market in Utah itself, is subjected to intense competition from its competitors throughout the west, especially from United States Pipe and Foundry Company, the giant of the industry, with a plant in California. The evidence also showed that the states of manufacture and origin of respondent's competitors, whether Birmingham, Alabama, Council Bluffs, Iowa, Decoto, California, or elsewhere, in no case attempt to levy a similar sales tax as here proposed on sales of pipe to out-of-state job sites. Respondent would thereby suffer a severe competitive injury and automatically be placed at a 2 per cent (now 3) competitive disadvantage with its competitors shipping from Iowa,

* The evidence showed that 68.9 per cent of all the sales involved herein have already been taxed by the states of destination, the only exceptions being those shipments into Idaho and Montana where no sales or use tax law is presently in force.

California, Alabama or elsewhere, whether the state of destination has or has not a sales and use tax law.

ARGUMENT

1. *The writ should not be granted because the decision of the Utah Supreme Court is in complete accord with prior decisions of this Court.*

What has been taxed here by Utah, the state of the seller, are the gross receipts, without apportionment, from interstate sales of cast iron pipe into specific out-of-state governmental sewage and waterworks jobs where under exactly the same set of contractual documents, seller paid the customer, instead of a common carrier, the established tariff rate to haul the pipe to the out-of-state job sites. A decision in favor of the state in this case would have restricted the protection of the Federal commerce clause to common carrier shipments even though in both classes of shipment title passed f.o.b. foundry and in neither class were there any diversions to local intra-state use by purchaser's breach of contract. In both classes of cases, the manifest certainty of shipment to out-of-state job site destination was equally plain.

The case is, of course, admittedly one of special facts and turned below on its special facts. The Utah Supreme Court found that the contract clearly called for an out-of-state shipment at a delivered price, including freight to destination, that seller paid freight to the customer for the interstate haul under the contract and bill of lading to the jobsite by crediting the tariff to the purchaser, that it was highly improbable, if not almost impossible, to conclude

the goods could be diverted to local use, that seller had no intent to circumvent any tax laws of the state or evade taxation, that the mere possibility of diversion to local use by purchaser's breach of contract could not, under the cited decisions of this Court, sustain or justify the tax.

Adams Manufacturing Company v. Storen, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), and *Freeman v. Hewit*, 329 U.S. 249 (1946), hold that the state of the seller cannot under the Federal commerce clause tax the unapportioned gross proceeds of an interstate sale. The decisions of this Court do, however, uphold the right of the state of the buyer to impose a sales or use tax on such proceeds.* The bulk of the sales here having already in fact been subjected to sales or use tax in the states of destination — although the Utah Supreme Court makes no particular, or any, point of this fact — double taxation of the gross receipts from the same interstate sales by the states of both origin and destination was here not merely a theoretical risk but an actual fact.

Any holding that the sales here involved were fully consummated locally, that the interstate shipment to out-

* Sales Taxes: Banker Brothers v. Pennsylvania, 222 U.S. 210 (1911)
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923)
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935)
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940)

Use Taxes: Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932)
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933)
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934)
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)

of-state job sites was merely an unrelated matter of the purchaser's subsequent intention having no connection with the seller, would not have accorded with the facts of the case.

The Utah Supreme Court simply holds that the theoretical possibility of diversion to local intra-state use by a purchaser's breach of contract — which did not occur — could not under the decisions of this Court sustain the tax. Moreover, it likewise follows the historic rule of this Court in both export and interstate commerce cases that the means of shipment are unimportant so long as the certainty of the foreign destination is plain. The test under the decisions of this Court is simply the manifest certainty of the out-of-state or foreign destination *under the facts of the case*. It is true the Utah Court, in its opinion, cites for this test chiefly the language in *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946), an export case. But the *Richfield Oil* opinion shows that, for this purpose, the test of manifest certainty of out-of-state destination is equally applicable to an interstate commerce case. The opinion, it will be recalled, quotes the phrase 'manifest certainty of the destination' from this Court's earlier opinion in the *Superior Oil* case, a case involving interstate commerce.

The petition essentially rests on the contention that the decision below is in conflict with *Superior Oil Co. v. Mississippi*, 280 U.S. 390 (1930), *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62 (1941), and *International Harvester Co. v. Dept of Treasury*, 322 U.S. 340 (1944). These cases, however, are unlike the case at bar.

In the *Superior Oil* case, oil and gasolene were sold and delivered to fish packers at wharves in Biloxi, Mississippi.

The subsequent transport by packers' boat 'to the neighborhood of Grants Pass, Louisana,' for resale to shrimp fishermen, was under a fictitious bill of lading without any use or purpose other than to give a color of interstate commerce to a clearly domestic transaction. "The seller of course paid no freight." "There was no consignee at the point of destination." "There was no point of destination for delivering the oil but merely a neighborhood. . ." The "gasolene was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." "The only purpose of the vendor . . was to escape taxation."

In the case at bar, the sale and delivery of pipe to the out-of-state job site was not under a fictitious bill of lading. It was not delivered to a 'neighborhood' but to specific trench site for burial at a specific location on a specific sewage or waterworks job. It was not a sale for some later resale but a sale to a contractor for a specific final use and consumption on a specific job. The seller paid the freight by crediting the established tariff rate against the delivered purchase price. There was a specific consignee at a specific point of destination. The pipe was not in the hands of the purchaser to do with as it liked but to deliver it to a specific job site where it would later be paid for out of the proceeds of a particular job. Finally, as the Utah Supreme Court stated, the documents of sale and transportation here were not "an evasive gesture to avoid taxation."

In the *Wood Preserving* case, the wood ties were sold and delivered in a transaction fully consummated in Indiana. The shipment by the railroad outside the state for

creosoting treatment of the ties by the seller's subsidiary, a separate company, was a separate transaction under a separate and distinct contract. The seller paid no freight and showing its name as consignor was of no consequence in view of the completed delivery in Indiana.

The ties were not sold and delivered to the railroad at a delivered price, including freight, to and for burial at a specifically described out-of-state job site on the railroad's line of track. The railroad when the ties were delivered in Indiana, was free to do with the ties as it saw fit. It could have stored or creosoted or otherwise used the ties locally.*

Likewise, in the *International Harvester* case, the Class D sales, as stipulated by the parties, involved sales by an Indiana seller of Indiana goods to an out-of-state buyer who came to Indiana, took delivery there and transported the goods to another State. The sale and delivery were fully consummated locally. There was nothing in the transaction which required either seller or buyer to transport the vehicles and implements outside the state. There was

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* The petition in the Wood Preserving case for a writ of certiorari filed by the Indiana tax authorities, states (p. 43):

"The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported."

nothing in the contract which prevented the customer, whether dealer or retail purchaser, from using, storing or reselling the goods in Indiana. The sales were not at delivered prices, including freight, for delivery and use at specific out-of-state job sites. A purchaser's intention to transport the goods outside Indiana (if he had such an intention) was of no concern to the seller and had no connection with the contract. A purchaser if he in fact transported the goods to his out-of-state place of business may have saved some freight but he was not *paid* freight by the seller, either in cash or by credit, to haul specific goods to a specific out-of-state destination. The International Harvester case is thus a pure 'intention' case.*

The interstate transportation of pipe here involved being incidental to and in furtherance of the primary construction business of the contractor-customers of respondent, constitutes private carriage under the Federal law applic-

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* This is abundantly clear even in the Harvester Company's brief filed in this Court opposing appellees' motion to dismiss appeal or affirm decision of State court, which states (pp. 7-8):

"It is true that in the class D sales the buyer would have complete control of the article in Indiana, but it is absurd to think there was any practical possibility that he would do anything with it but take it back to his own home town, which he did do. If the buyer were a dealer he *intended* to take it to his place of business. If the buyer were a user he *intended* to take it to his home. He had no other place of business and he had no other home." (Italics supplied).

Appellees' reply in their statement of matters and grounds making against the jurisdiction of this Court, etc., (p. 10) was as follows:

"That the buyer intended to transport the goods purchased into another State; that the buyer intended to resell them or that the buyer had any particular intent, is therefore, wholly immaterial."

able to motor carriers, whether or not the contractor happens to make a profit from the transportation activity and whether title passes to the contractor f. o. b. point of origin or point of destination. See: *Williams Bros. Corp. Cont. Car. App.*, 44 Motor Carrier Cases (ICC) 557 (Div. 5) (1945); *Brooks Transp. Co., Inc. v. United States*, 93 Fed. Sup. 517 (1950) (E. D. Va.), affirmed 340 U.S. 925, (also affirming *Lenoir Chair Co. Cont. Car. App.*, 51 MCC 65).

The cases relied on by petitioner, furnish no support for the granting of a writ of certiorari in this case.

2. *The writ should not be granted because the question involved is of no substantial importance to anyone, except this respondent.*

Respondent concedes that the decision of the Utah Supreme Court in this case is a very interesting one. It is made not the less so, by reason of the fact that the state of the seller has here attempted to tax the same proceeds of interstate sales already taxed by the state of the buyer. It thus involves in fact what the several decisions of this Court marking out the boundaries of state power in this area have had to treat as merely a potential risk. Here the Utah Court came to the bridge long anticipated by the decisions of this Court and crossed it.

This does not mean, however, that the question is of any substantial importance to taxing authorities generally. It was a case of special facts and turned on special facts. It obviously does not discredit, as claimed by petitioner, any decision of this Court, least of all the International Harvester decision.

Petitioner attempts to stress the 'difficult burden of extracting proof' in cases of sales of property for out-of-state use as a reason here for the granting of certiorari. The obvious answer to this suggestion is that factual determinations cannot be avoided in administrating any tax law. A factual determination of the 'manifest certainty' of an out-of-state destination should present no particular or extraordinary difficulty. If the facts do show such 'manifest certainty,' as here, a state should not be permitted in the words of the Utah Supreme Court to "obfuscate the true purpose and intent of the commerce clause."

The case was of critical importance to respondent but to no one else. The double tax on the same transactions by the states of both seller and buyer here put respondent's back to the wall in a practical competitive way. Its competitors do not pay a double tax. Further, the customer relationships involved here are such that respondent can shift to the consumer the tax in the buyer's state of destination and use. Competitively and economically, however, the transactions cannot also absorb a tax on the gross proceeds of sale by the state of manufacture and origin without extremely serious injury to respondent's vital interstate business.

3. *The writ should not be granted because the decision may rest on an adequate state ground.*

The Utah sales tax law exempts from tax "sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States." (Sec. 59-15-6, U.C.A. 1953). The sales tax regulations defining interstate commerce are set forth on pages 12-13 of the petition. These state regulatory definitions provide that to constitute interstate commerce:

"1. The transaction must involve actual and physical movement of the property sold across the state line.

2. Such movement must be an essential and not an incidental part of the sale.

3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer."

It is, of course, clear from the facts outlined in the opinion of the Utah Supreme Court that all three of the above definitional tests are met. All of the goods moved across the state line as an essential part of the sale under contracts legally obligating the seller to make delivery to the out-of-state job sites. The transactions are, therefore, exempt from tax by reason of the Utah State Tax Commission regulations, duly issued under the statute and having the full force and effect of state law. The question of the existence of an adequate state ground is therefore debatable.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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